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5 **UNITED STATES DISTRICT COURT**  
6 **SOUTHERN DISTRICT OF CALIFORNIA**  
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8 CARRIE COUSER, individually and on  
9 behalf of all others similarly situated,  
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11  
12 Plaintiff,  
13 v.  
14 COMENITY BANK,  
15  
16 Defendant.

Case No.: 12cv2484-MMA (BGS)

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
UNOPPOSED MOTION FOR CY  
PRES DISTRIBUTION**

[Doc. No. 96]

15 On October 12, 2012, Plaintiff Carrie Couser filed this putative class action  
16 alleging violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §  
17 227 *et seq.* See Doc. No. 1. Plaintiff now moves the Court for approval of *cy pres*  
18 distribution of remaining settlement funds to certain beneficiaries. See Doc. No. 96. The  
19 Court found the matter suitable for determination on the papers and without oral  
20 argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons set forth below, the  
21 Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff's motion.

22 **BACKGROUND**

23 This action is premised on allegations that Defendant contacted Plaintiff on her  
24 cellular telephone in an attempt to collect an alleged debt owed by Plaintiff's mother.  
25 Plaintiff alleges that Defendant used an automatic telephone dialing system to place  
26 multiple calls to her each day, and that she incurred charges for incoming calls. The  
27 Parties ultimately entered into a settlement agreement and on May 27, 2015, the Court  
28 granted final approval of the class action settlement ("the Settlement"). See Doc. No. 91.

1 For the purposes of settlement, the Court certified the following Settlement Class:

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3 All persons whose cellular telephone numbers were called by  
4 Defendant, released parties, or a third party dialing company on  
5 behalf of Defendant or the released parties, using an automatic  
6 telephone dialing system and/or an artificial or prerecorded  
7 voice, without consent, from August 1, 2010 through May 26,  
8 2014, excluding those persons whose cellular telephone  
9 number/s were marked with a “wrong number” code in  
10 Defendant’s database (which persons are included in the  
11 putative class in *Picchi v. World Financial Network Bank, et*  
12 *al.*, Case No.:11-CV-61797, currently pending in the Southern  
13 District of Florida).

14 Excluded from the Class is Defendant, its parent companies,  
15 affiliates or subsidiaries, or any employees thereof, and any  
16 entities in which any of such companies has a controlling  
17 interest; the judge or magistrate judge to whom the Action is  
18 assigned; and, any member of those judges’ staffs and  
19 immediate families, as well as persons who validly request  
20 exclusion from the Settlement Class.

21 *See* Doc. No. 91.

22 Further, as part of the Settlement, Defendant was required to establish a non-  
23 reversionary Settlement Fund in the amount of \$8,475,000.00. After costs and fees were  
24 distributed, the Net Settlement Amount was to be distributed *pro rata* to Class Members  
25 who had submitted valid and approved claims. Pursuant to the Settlement, the Claims  
26 Administrator was to mail Settlement Checks to those Class Members, and any funds not  
27 paid out as a result of un-cashed<sup>1</sup> Settlement Checks would be paid as *cy pres* awards to  
28 recipients to be agreed upon by the Parties, and upon Court approval. *See* Doc. No. 91.

29 Now, Plaintiff moves for Court approval of *cy pres* distribution of the remaining  
30 balance of the Settlement Fund, which amounts to approximately \$871,549.69.<sup>2</sup> *See* Doc.  
31 No. 96. Specifically, Plaintiff requests that the balance be divided equally and distributed

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<sup>1</sup> Claimants were required to cash Settlement Checks within 180 days.

<sup>2</sup> This amount was calculated as of March 8, 2017, and includes earned interest. *See* Doc. No. 96.

1 to: (1) New Media Rights; (2) Consumer Federation of California; (3) Public Justice  
2 Foundation; and (4) Bet Tzedek Legal Services. Defendant Comenity Bank does not  
3 oppose this motion.<sup>3</sup>

#### 4 LEGAL STANDARD

5 “[T]he ‘*cy pres*’ doctrine allows a court to distribute unclaimed or non-distributable  
6 portions of a class action settlement fund to the ‘next best’ class of beneficiaries.” *See*  
7 *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Nachshin v. AOL,*  
8 *LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011)). “[A] district court should not approve a *cy*  
9 *pres* distribution unless it bears a substantial nexus to the interests of the class members,”  
10 meaning that the distribution “must account for the nature of the plaintiffs’ lawsuit, the  
11 objectives of the underlying statutes, and the interests of the silent class members.” *Id.*  
12 (citing *Nachshin*, 663 F.3d at 1036); *see also Six (6) Mexican Workers v. Arizona Citrus*  
13 *Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990) (setting aside district court’s *cy pres*  
14 application where distribution to the chosen recipient organization would have  
15 “benefit[ed] a group far too remote from the plaintiff class”).

#### 16 DISCUSSION

17 Here, “[t]he purpose of the TCPA is to ‘protect the privacy interests of residential  
18 telephone subscribers by placing restrictions on unsolicited, automated telephone calls to  
19 the home and to facilitate interstate commerce by restricting certain uses of facsimile  
20 machines and automatic dialers.’” *Aboudi v. T-Mobile USA, Inc.*, No. 12CV2169 BTM  
21 NLS, 2015 WL 4923602, at \*5 (S.D. Cal. Aug. 18, 2015) (quoting *Satterfield v. Simon &*  
22 *Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009)). In enacting the TCPA, Congress  
23 sought to protect people from unsolicited, automated phone calls because they cause a  
24 nuisance and constitute invasions of privacy. *See Cabiness v. Educ. Fin. Sols., LLC*, No.  
25 16-CV-01109-JST, 2016 WL 5791411, at \*6 (N.D. Cal. Sept. 1, 2016); *Satterfield v.*

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28 <sup>3</sup> In fact, Plaintiff’s counsel declares under penalty of perjury that Defendant agreed to the four proffered  
beneficiaries. *See* Doc. No. 96-2, Decl. of Abbas Kazerounian.

1 *Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009).

2 Keeping in mind the foregoing, the Court discusses each of the proffered *cy pres*  
3 beneficiaries and their nexus to class interests and TCPA claims in turn below.

4 1. *New Media Rights*

5 New Media Rights (“NMR”) is a program of California Western School of Law  
6 committed to “consumer privacy work.” *See* Decl. of Art Neill, Doc. No. 96-3. *Cy pres*  
7 funds, if approved, would “support pro bono preventative privacy related legal services  
8 for consumers, nonprofits, technology entrepreneurs, and creators across the United  
9 States.” *See* Decl. of Art Neill. The program “provide[s] direct legal education and  
10 services to consumers,” including “assisting internet users in understanding their rights  
11 regarding unwanted text messages, emails, and phone calls under the TCPA and related  
12 privacy laws.” *See* Decl. of Art Neill. NMR also advises “technology startups,  
13 nonprofits, creators and other small enterprises on how to comply with privacy laws in a  
14 consumer friendly way.” *See* Decl. of Art Neill. NMR also provides this type of  
15 information on its “heavily trafficked” website. In the past, NMR has “drafted  
16 recommendations regarding the TCPA and other consumer privacy concerns” to as a  
17 member of the Federal Communications Committee’s Consumer Advisory Committee.  
18 Art Neill, the executive director and founder of NMR, provides specific examples of  
19 recommendations the program has made to the FCC, which directly address the TCPA.  
20 *See* Decl. of Art Neill.

21 Based on NMR’s previous and current commitment to issues of consumer privacy  
22 rights and in particular, the statutory scheme at issue in this action, distribution to NMR  
23 would “account for the nature of [Plaintiff’s] lawsuit, the objectives of the underlying  
24 statutes, and the interests of the silent class members.” *See Lane*, 696 F.3d at 819.  
25 Further, despite that the program is headquartered in San Diego, the program clearly has  
26 nationwide impact. *Cf. Nachshin*, 663 F.3d 1034, 1040 (disapproving of *cy pres*  
27 distribution in part because the settlement class was nationwide yet “two-thirds of the  
28 donations [would] be made to local charities in Los Angeles”). Accordingly, distribution

1 to NMR is appropriate.

2       2.     *Consumer Federation of California*

3       According to the executive director of CFC, Richard Holober, the Consumer  
4 Federation of California (“CFC”) is “a non-profit consumer advocacy organization”  
5 which “work[s] to improve state and federal consumer protection laws.” *See* Decl. of  
6 Richard Holober, Doc. No. 96-4. The organization has advocated for enactment of a  
7 financial privacy law, and legislation protecting against identify theft. CFC has also  
8 advocated for the protection of cellular phone users’ Customer Proprietary Network  
9 Information, and “led the fight that stopped a 2015 attack on California’s two party  
10 consent law for recording or monitoring cellular phone conversation.” *See* Decl. of  
11 Richard Holober. Further, CFC has testified in regulatory proceedings in support of  
12 “restricting insurer access to a motorist’s confidential automobile’s transponder data,”  
13 and sponsored a law preventing “rent to own companies from secretly placing spyware  
14 on rental computers.” *See* Decl. of Richard Holober. CFC has also had a hand in  
15 enacting legislation regarding the privacy of information concerning the online activities  
16 of public school students, limitations on the usage of toll collection data, limitations on  
17 the usage of sensitive passenger information by transportation companies, and legislation  
18 regarding California’s Confidentiality of Medical Information Act.

19       While CFC may advocate for worthy causes, the Court is bound by Ninth Circuit  
20 precedent requiring that those causes be aligned with class members’ interests and the  
21 litigation’s underlying claims. The TCPA guards against the nuisance and costs of  
22 unwanted telephone calls—regardless of the purpose of the call, or any information  
23 potentially gathered during that call. CFC’s focus appears to be primarily on privacy of  
24 information and how certain information is used, rather than on the privacy of individuals  
25 from unwelcome contact.<sup>4</sup> Further, Mr. Holober does not state for what purpose the cy

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28 <sup>4</sup> The Court is also unpersuaded that the sole fact that CFC has previously “joined in a letter to the FCC . . . seeking to maintain the strong protections of the TCPA” sufficiently establishes the requisite nexus.

1 *pres* funds would be used. Accordingly, based on the declaration provided, the Court  
2 cannot be reasonably certain that distribution to CFC would “(1) address the underlying  
3 statute[], (2) target the plaintiff class, or (3) provide reasonable certainty that any member  
4 will be benefited.” *See Nachshin*, 663 F.3d at 1040. The Court declines to approve *cy*  
5 *pres* distribution to CFC.

6 3. *Public Justice Foundation*

7 “Public Justice PC pursues high impact lawsuits to combat social and economic  
8 injustice, protect the Earth’s sustainability, and challenge predatory corporate conduct  
9 and government abuses.” *See* Decl. of F. Paul Bland, Doc. No. 96-5, ¶ 3. The Public  
10 Justice Foundation, a non-profit “charitable membership organization,” “supports Public  
11 Justice PC’s cutting-edge litigation and educates the public about critical public interest  
12 issues.” *See* Decl. of F. Paul Bland, ¶ 4. Both organizations have their headquarters in  
13 Washington, D.C. Public Justice has litigated “issues that are central to the enforcement  
14 of the [TCPA],” such as whether “an unaccepted offer of judgment to the named class  
15 representative [rendered moot] a class action.” *See* Decl. of F. Paul Bland, ¶ 6. Also,  
16 Public Justice “filed an amicus brief in *Spokeo, Inc. v. Robins*, No. 13-1339, 2016 U.S.  
17 LEXIS 3046 (May 16, 2016),” regarding “Article III challenges to standing in privacy  
18 injury cases.” *See* Decl. of F. Paul Bland, ¶ 6. Further, Public Justice “provides  
19 assistance and information on a pro bono basis to individuals and attorneys who represent  
20 individuals and classes who have been harassed by violators of the TCPA,” and holds  
21 educational events regarding “issues involving challenges to abuses of mandatory  
22 arbitration clauses (a major defense in many privacy injury cases).” *See* Decl. of F. Paul  
23 Bland, ¶ 7. The executive director of both organizations, F. Paul Bland, declares under  
24 penalty of perjury that *cy pres* funds will be used “to further [the organizations’]  
25 consumer protection advocacy and education efforts nationwide.” *See* Decl. of F. Paul  
26 Bland, ¶ 9.

27 Distribution to the Public Justice Foundation bears a sufficiently “substantial nexus  
28 to the interests of the class members,” particularly based on the organizations’ focus on

1 issues related to enforcement of the TCPA, such as current Article III standing issues, and  
2 assistance to those whose rights under the TCPA may have been violated. *See Lane*, 696  
3 F.3d at 819. Accordingly, the Public Justice Foundation is sufficiently “tethered to the  
4 nature of the lawsuit and the interests of the silent class members,” such as their interest  
5 in redressing violations of the TCPA in federal courts. *See Nachshin*, 663 F.3d at 1039.  
6 Further, Public Justice’s work benefits consumers nationwide. Thus, the Court approves  
7 distribution of *cy pres* funds to the Public Justice Foundation.

8       4.     *Bet Tzedek Legal Services*

9       Lastly, Plaintiff requests the Court approve *cy pres* distribution to Bet Tzedek  
10 Legal Services in Los Angeles. Bet Tzedek “is a non-profit legal services program that  
11 provides free legal services primarily to low-income residents of Southern California.”  
12 *See* Doc. No. 96-6, Decl. of Gus T. May, ¶ 4. Gus T. May, the legal director at Bet  
13 Tzedek, states that the organization represents clients “in numerous legal areas,” such as  
14 elder law, (specifically, elder financial abuse), real estate fraud, consumer fraud, debtor’s  
15 rights, debt counseling, housing and government benefits, employment law, (specifically,  
16 wage theft), human trafficking, and “tax problems resulting from fraud against our  
17 clients.” *See* Decl. of Gus T. May, ¶ 7.

18       Based on this information, the Court declines to approve *cy pres* distribution to Bet  
19 Tzedek. Again, while the organization may support noble causes, *cy pres* beneficiaries  
20 must have more than a tenuous connection to the Class and litigation. *See Lane*, 969 F.3d  
21 at 821 (stating that in *Nachshin* and *Six (6) Mexican Workers*, “the connection between  
22 the *cy pres* recipients and the absent class members” was “too tenuous”). Here, based on  
23 Mr. May’s declaration, Bet Tzedek’s work appears to be insufficiently related to the  
24 absent Class Members’ interests and the purpose of the TCPA. The organization  
25 provides legal services in a wide variety of areas, the majority of which are unrelated to  
26 the invasion of privacy interests contemplated by the TCPA. Also, Bet Tzedek  
27 admittedly predominately serves residents of Los Angeles, further diminishing the  
28 likelihood that any Class Member in the nationwide Class would indirectly benefit from

1 the *cy pres* distribution. *See Six (6) Mexican Workers*, 904 F.2d at 1308 (stating that *cy*  
2 *pres* “distribution of unclaimed funds” is meant to “indirectly benefit the entire class”);  
3 *see Nachshin*, 663 F.3d at 1040 (“The *cy pres* distribution also fails to target the plaintiff  
4 class, because it does not account for the broad geographic distribution of the class.”).  
5 Lastly, Mr. May does not describe for what specific purpose the funds would be used for.  
6 *See Decl. of Gus T. May*, ¶ 9 (stating only that the funds, if approved, “will directly  
7 support these vital legal services”). Unfortunately, for the reasons stated above, the Court  
8 declines to approve *cy pres* distribution to Bet Tzedek.

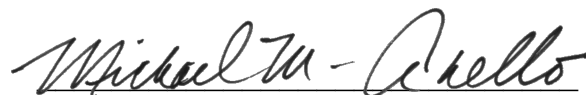
9 **CONCLUSION**

10 In sum, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff’s motion  
11 for approval of *cy pres* distribution as set forth above, and further **ORDERS** that:

- 12 1. New Media Rights and Public Justice Foundation are designated the *cy pres*  
13 beneficiaries of the remaining balance of the settlement fund and must share  
14 equally in the *cy pres* award; and  
15 2. Kurtzman Carson Consultants, LLC, the claims administrator, must  
16 promptly distribute the *cy pres* award to New Media Rights and Public  
17 Justice Foundation in equal amounts.

18 **IT IS SO ORDERED.**

19  
20 Dated: May 26, 2017

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22 Hon. Michael M. Anello  
23 United States District Judge  
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